



FEDERAL TRADE COMMISSION

[Billing Code: 6750-01S]

16 CFR Part 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing amendments to the premerger notification rules (“the Rules”) to provide a framework for the withdrawal of a premerger notification filing under the Hart Scott Rodino Act (“the Act” or “HSR”). The Act and Rules require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission (“the Commission”) and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“the Assistant Attorney General”) (collectively, “the Agencies”) and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. This proposed rulemaking sets forth the procedure for voluntarily withdrawing an HSR filing, establishes when an HSR filing will be automatically withdrawn after an electronically submitted filing publicly announcing the termination of a transaction is made with the U. S. Securities and Exchange Commission (“SEC”) under the Securities Exchange Act of 1934 and rules promulgated under that act, and sets forth the procedure for resubmitting a filing after a withdrawal with no additional filing fee.

DATES: Comments must be received on or before April 15, 2013.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “HSR Filing Withdrawals Rulemaking, Project No. P859910,” on your comment, and file your comment online at

<https://ftcpublic.commentworks.com/ftc/hsrruleamendnprm>, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113

(Annex H), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert L. Jones, Deputy Assistant Director, Premerger Notification Office, Bureau of Competition, Room 302, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326-3100.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 15, 2013. Write “HSR Filing Withdrawals Rulemaking, Project No. P859910,” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at

<http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personally identifiable information, like any Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you would like the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).¹ Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at

<https://ftcpublic.commentworks.com/ftc/hsrruleamendnprm>, by following the instructions on

¹ In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

the web-based form. If this Notice appears at <http://www.regulations.gov/#!home;tab=search>, you also may file a comment through that website.

If you file your comment on paper, write “HSR Filing Withdrawals Rulemaking, Project No. P859910,” on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex H), 600 Pennsylvania Avenue, NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 15, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

Statement of Basis and Purpose

Section 7A(d)(1) of the Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the

terms used in the Act and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

In this proposed rulemaking, the Commission proposes adding §803.12 to set forth the procedure for voluntarily withdrawing an HSR filing, establish when an HSR filing will be automatically withdrawn after a filing publicly announcing the termination of a transaction is made on EDGAR, the Electronic Data Gathering, Analysis, and Retrieval system where companies who file reports with the SEC must make such submissions, and set forth the procedure for resubmitting a filing with no additional filing fee after a withdrawal. Additionally, the Commission proposes adding §803.9(f) to establish that no additional filing fee is required when §803.12(c) is utilized.

PART 803 - TRANSMITTAL RULES

Section 803.12 Withdraw and Refile Notification.

Since the beginning of the HSR program, the Agencies have allowed HSR filers to withdraw their notification filing at any time. To set forth the procedure, and to require automatic withdrawal of a notification filing in certain circumstances in which an SEC filing is made publicly announcing the termination of a transaction, this rulemaking proposes adding rule §803.12.

A. Voluntary Withdrawal

Under proposed rule §803.12(a), at any time, an acquiring person, or in transactions to which §801.30 does not apply (a “non-§801.30 transaction”), an acquiring or an acquired person, may withdraw its notification by notifying the FTC and the Antitrust Division in writing. Doing so will nullify the filing and terminate the pendency of any formal Request for Additional

Information (“Second Request”) if substantial compliance has not been certified. If the transaction has been granted early termination or the initial or extended waiting period has expired, the one year period that parties have under §803.7(a) to consummate the transaction will terminate. If the parties wish to pursue the acquisition at a future date, new notifications and a new filing fee will be required (unless the withdraw-refile procedure in paragraph (c) of §803.12 is utilized), and a new waiting period must be observed prior to consummation of the acquisition.

B. Automatic Withdrawal

The Agencies have a strong interest in ensuring that they do not expend scarce resources on hypothetical transactions. The affidavit requirements of §803.5 provide assurance that at the time of filing, a transaction is not hypothetical. When parties to a transaction make an HSR filing, the filing must include an affidavit attesting, in the case of a tender offer under §801.30, that the intention to make the tender offer has been publicly announced, and in the case of a non-§801.30 transaction, that a contract, agreement in principle or letter of intent has been executed. The affidavit must also attest to a good faith intention to proceed with the transaction. As the Commission stated when it issued §803.5:

Two considerations motivate the inclusion of subparagraph (a)(2) and paragraph (b), which require a good faith intention to make the acquisition, public announcement of tender offers, and execution of a contract, agreement in principle or letter of intent. First, those provisions ensure that the parties intend to consummate the acquisition, and are not using notification as a means of testing the agencies' enforcement intentions. Because of the time and resource constraints upon the agency staffs, the agencies could not tolerate review of hypothetical transactions. Second, the requirement assures that the forms will

contain sufficiently definitive information about the transaction to permit accurate analysis.

43 FR 33450 (July 31, 1978).

After the HSR filings are made, circumstances may change so that the transaction becomes hypothetical in that the factual basis for the §803.5 affidavit no longer exists: the tender offer may have expired, been terminated, or been withdrawn, or the agreement between the parties may have been terminated. The Agencies have encountered some such instances where the parties do not withdraw their filing and continue to move forward with the HSR process, for example, by moving ahead with second request compliance. This can happen where, in the §801.30 context, despite the tender offer having expired, been terminated, or been withdrawn, the offeror indicates that it may launch another offer in the future; it can also happen in non-§801.30 transactions where a merger agreement has been terminated, yet the parties state that they hope to negotiate another. In these instances, the investigating Agency is forced to expend scarce resources on what has become a hypothetical transaction.

Proposed rule §803.12(b) addresses this problem by linking the HSR filing with disclosures required by the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and rules promulgated under that act. Under those SEC disclosure requirements, when the terms or conditions of a tender offer have not been met and subsequently the tender offer has expired, is terminated or has otherwise been withdrawn, the offeror must file an amendment to its Schedule TO filing with the SEC. This amended filing brings the current tender offer to a definitive end and if the offeror wishes to launch another tender offer, it must start the process from the beginning by filing a new Schedule TO. Similar disclosure requirements exist for

acquisitions outside of the §801.30 tender offer context, those that are instead the subject of an agreement between the parties. In the case of non-§801.30 transactions, if the parties terminate a definitive material agreement, they must file a Form 8-K with the SEC disclosing the termination of the agreement. If the parties subsequently become interested in moving forward with the transaction once again and sign another definitive material agreement, they must file a new Form 8-K with the SEC.²

The SEC disclosure requirements in both the §801.30 tender offer and the non-§801.30, non-tender offer context are clear. Once these termination disclosures are made with the SEC, the parties' transaction as filed with the Agencies has become hypothetical because the factual basis for a §803.5 affidavit no longer exists. At this point, the parties would not be able to execute the affidavit required by §803.5 without taking additional steps. In the case of a tender offer under §801.30, the acquiring person would have to make a public announcement concerning its intent to commence a tender offer in order to execute the affidavit. In the case of a non-§801.30 transaction, the parties would have to execute a letter of intent or some other agreement in order to execute the affidavit.

The Commission proposes using the SEC's disclosure requirements to establish a bright line trigger for the automatic withdrawal of an HSR filing. In the case of tender offers under §801.30, any time a tender offer has expired, is terminated or has otherwise been withdrawn that results in the filing of an amended Schedule TO with the SEC, the Commission proposes that the associated HSR filing will be automatically withdrawn. The Commission also proposes that the

² Parties also may file a Form 8-K voluntarily to announce the entry into, or termination of, agreements, including letters of intent. Under this proposed rulemaking, such voluntary disclosures of termination would be treated the same way as a mandatory Form 8-K filing disclosing the termination of a definitive material agreement.

same concept would apply to non-§801.30 transactions, such that any time an agreement between the parties is terminated that results in the filing of a Form 8-K with the SEC, the associated HSR filing will be automatically withdrawn. In both cases, the Commission proposes that the associated HSR filing would be automatically withdrawn on the date of the filing with the SEC and that the parties must notify the Agencies by letter when the SEC filing is made. Any subsequent transaction between the parties, if otherwise reportable, would be subject to a new HSR filing and a new filing fee (unless the special circumstances of §803.12(c) apply).

At the same time, the Commission recognizes that there will be instances where transactions that trigger SEC disclosure requirements should not result in the automatic withdrawal of an HSR filing. If the Agencies have already completed an investigation of a transaction, the expiration or withdrawal of a tender offer or the termination of an acquisition agreement does not affect the Agencies' ability to allocate resources. Thus, the Commission proposes three exceptions for transactions that have not been or are no longer being investigated.

The Commission proposes that the associated HSR filing will not be automatically withdrawn:

- (1) if the initial waiting period has expired without issuance of a request for additional information or documentary material and without an agreement in place with the Agencies to delay closing of the transaction ("a timing agreement"); or
- (2) if early termination of that waiting period has been granted, without a timing agreement in place; or

(3) if a second request has been issued, and the Agencies have either granted early termination or allowed the extended waiting period to expire following certification of compliance without a timing agreement in place.

The Commission understands that withdrawal procedures in this proposed rulemaking will not result in an automatic withdrawal in all instances in which a transaction becomes hypothetical. For instance, parties can make an HSR filing for a non-§801.30 transaction on the basis of a letter of intent without having to make a mandatory filing of a Form 8-K with the SEC upon termination and may choose not to do so voluntarily. In addition, tender offers for non-public companies that are not large enough or widely enough held to be covered by the SEC disclosure requirements would not trigger the need to file an amended Schedule TO upon termination. Finally, tender offers for foreign companies that do not have sufficient U.S. ownership and may therefore be exempt from the SEC disclosure requirements would not trigger the need to file an amended Schedule TO upon termination.

The Commission believes the benefit of the approach outlined in this proposed rulemaking will outweigh any additional burden on the parties. The proposal provides a bright line test that will better allow the Agencies to allocate their scarce resources so as to avoid expending resources on transactions where SEC filings demonstrate that the transaction has become hypothetical.

C. Resubmission

For years, the Premerger Notification Office (“PNO”) has informally permitted an acquiring person voluntarily to withdraw a pending HSR filing and resubmit it within two business days without paying an additional fee in order to restart the waiting period. This

informal procedure benefits the filing parties by providing an additional 15- or 30-day waiting period for the Agencies to review the competitive impact of a transaction without issuing a Second Request. When an acquiring person chooses to withdraw and refile, it must update certain items in its HSR filing, but it retains the same transaction number and does not pay an additional filing fee. Although experienced practitioners are familiar with this procedure, this withdraw and refile procedure has never been formalized. The Commission proposes to do so now through a new rule, §803.12(c).

When a filing is voluntarily withdrawn by the acquiring person pursuant to proposed §803.12(a) or the acquiring person's filing is automatically withdrawn pursuant to proposed §803.12(b) as discussed above, the acquiring person may resubmit the HSR filing without paying an additional fee if the acquiring person complies with certain requirements. The proposed resubmission process may only be used by an acquiring person in the following circumstances:

- (1) The proposed acquisition must not have changed in any material way. For instance, if it is an asset transaction, the resubmitted HSR filing cannot involve additional assets. If it is a voting securities transaction, the resubmitted HSR filing cannot involve a higher notification threshold;
- (2) The resubmitted HSR filing must be recertified, and Items 4(a), 4(b), 4(c), and 4(d) must be updated;
- (3) The resubmitted HSR filing must include a new executed affidavit as required by §803.5; and
- (4) The resubmitted HSR filing must be refiled with both Agencies prior to the close of the second business day after withdrawal.

The procedure above is straightforward and based on the existing informal process. The refiling must involve the same transaction, include an updated Item 4, and be made within two

business days after withdrawal. The requirement that the acquiring person must submit a new certification assures the accuracy of the HSR filing. In submitting a new affidavit, the acquiring person must attest, in the case of a tender offer under §801.30, that the intention to make the tender offer has been publicly announced, and in the case of a non-§801.30 transaction, that a contract, agreement in principle or letter of intent has been executed, as well as attest to its good faith intention to proceed with the transaction.

If the requirements of proposed §803.12(c) are met, no new filing fee will be assessed and the PNO will assign the same HSR transaction number to the resubmitted HSR filing. The new waiting period will commence on the same day the resubmitted notification filing is received. Withdrawal, whether voluntary or automatic, and resubmission without the payment of an additional fee, will only be permitted once.

It has been the longstanding position of the Agencies that only the acquiring person may avail itself of refiling. If the acquired person, in the case of an acquisition to which §801.30 does not apply, withdraws its notification under paragraph (a) or its filing is automatically withdrawn under paragraph (b) of this section, no resubmission under paragraph (c) of this section is available.

Section 803.9 Filing Fee.

In previous rulemakings, the Commission has addressed other instances in which a filing fee is technically required but is not necessary, given the parameters of the specific situation.

For example, the Commission has stated:

In transactions in which there are two acquiring persons that would have the same responses to Items 5-8 of the Notification and Report Form, those two acquiring persons

would have no significant business activities outside of the jointly controlled acquisition vehicle. Accordingly, the agencies are again essentially reviewing one transaction and a single filing fee seems appropriate. Eliminating the double fee for these transactions is non-controversial and benefits potential filing parties.

66 FR 8680 (February 1, 2001). In the instance above, although there are two acquiring persons and two fees are technically required, a single fee is appropriate because it is one transaction.

The same basis for eliminating the filing fee applies to a withdrawn filing that is refiled within two business days and meets the other requirements of §803.12(c). If the acquiring person voluntarily withdraws its filing under §803.12(a) or faces the automatic withdrawal provision of proposed §803.12(b), and the Agencies are reviewing a transaction that is the same in all material respects, they face no disadvantage if the acquiring person resubmits within two business days under §803.12(c). Accordingly, in such a case, no new fee would be required.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. 16 CFR 1.26(b)(5).

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR filing, the

premerger notification rules rarely, if ever, affect small businesses. The 2000 amendments to the Act exempted all transactions valued at \$50 million or less, with subsequent automatic adjustments to take account of changes in GNP resulting in a current threshold of \$68.2 million. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these proposed rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501-3521, requires agencies to submit “collections of information” to the Office of Management and Budget (“OMB”) and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The existing information collection requirements in the Rules and Form have been reviewed and approved by OMB under Control No. 3084-0005. The current OMB clearance expires on August 31, 2014. The proposed rule amendments in this NPR would have at most, a minor effect on the FTC’s current burden estimates. Should these proposed amendments become final, the FTC will submit an adjustment request to OMB to modify the currently cleared burden estimate.³

³ The currently cleared burden hours total is 53,756, calculated as follows: [(1,428 non-index filings x 37 hours) + (22 transactions requiring more precise valuation x 40 hours) + (20 index filings x 2 hours)]. See 76 FR 42471, 42479 (July 19, 2011). The instant proposed amendments, as detailed below, would incrementally add no more than 3 hours to this total. Separately, the FTC has estimated incremental PRA burden of 2,664 hours for the Commission’s proposed amendments to sections 801.1 and 801.2 of the Rules that would reflect the longstanding staff position that a transaction involving the transfer of exclusive rights to a patent

When calculating burden for the proposed amendments, there are two potential scenarios. Under proposed §803.12(a) and (b), a voluntary or automatic withdrawal of a notification that utilizes the two-day resubmission process under §803.12(c) does not generate an additional transaction as the acquiring person simply restarts the waiting period on the same transaction. Thus, there is no net increase in the number of transactions. In a §803.12(b) scenario involving an auto-withdrawn notification that does not utilize the two-day resubmission process under §803.12(c), a new filing would be required if the parties pursue the transaction at a later date, but the likelihood of this occurring is rare. Based on past experience, this situation occurs approximately once every fifteen years. Effectively, then, this averages out to a small fraction of a single transaction per year that would require non-index HSR filings due to the proposed rule change. The currently cleared estimate for a single non-index filing is 37 hours.⁴ See 76 FR 42471, 42479 (July 19, 2011). PNO staff believes that this new filing will require the same work and diligence as any new non-index filing. Assuming, then, an average of 37 hours for one transaction, when applied to a traditional frequency of .067 (one every fifteen years), this amounts to an annual average of 3 hours, rounded up. Applied to an assumed hourly wage or

in the pharmaceutical industry is potentially reportable under the Act. See 77 FR 50057 (August 20, 2012).

⁴ “Index” filings pertain to banking transactions, and thus would not be affected by the proposed amendments. Index filings are incorporated, however, into the FTC’s currently cleared burden estimates (the FTC has jurisdiction over the administration of index filings). They are mentioned here to distinguish them from and to further explain what a “non-index” filing is. Clayton Act Sections 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the Agencies. Thus, parties must submit copies of these “index” filings, but completing the task requires significantly less time than non-exempt transactions (which require “non-index” filings), as illustrated by the calculations in footnote 2 above.

rate of \$460/hour for an executive or attorney's handling, associated labor cost would approximate \$1,380.

PNO staff believes that any incremental capital/non-labor costs presented by the proposed amendments would be marginal. Businesses subject to the Rules generally have or would obtain necessary equipment for other business purposes. Staff believes that the existing requirements (and proposed extension to certain additional transactions) necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates. This should constitute a small portion of and be subsumed within the ordinary training that employees receive apart from that associated with the information collected under the Rules and the corresponding HSR Form.

List of Subjects in 16 CFR Part 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes to amend 16 CFR part 803 as set forth below:

PART 803 – TRANSMITTAL RULES

1. The authority citation for part 803 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

2. Amend § 803.9 by revising paragraph (a) and adding paragraph (f) to read as follows:

§803.9 Filing fee.

(a) Each acquiring person shall pay the filing fee required by the act to the Federal Trade Commission, except as provided in paragraphs (b), (c) and (f) of this section. No additional fee is to be submitted to the Antitrust Division of the Department of Justice.

* * *

(f) For a transaction described by paragraph (c) of §803.12, the parties shall pay no additional filing fee.

3. Add § 803.12 to read as follows:

§803.12 Withdraw and refile notification.

(a) *Voluntary.* An acquiring person, and in the case of an acquisition to which §801.30 does not apply, an acquired person, may withdraw its notification by notifying the Federal Trade Commission and the Antitrust Division in writing of such withdrawal.

(b) *Upon public announcement of termination.* An acquiring person's notification or, in the case of an acquisition to which §801.30 does not apply, an acquiring or an acquired person's notification, will be deemed to have been withdrawn if any filing that publicly announces the expiration, termination or withdrawal of a tender offer or the termination of an agreement or letter of intent is made by the acquiring person or the acquired person with the U.S. Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and rules promulgated under that act. The acquiring person or acquired person must notify the Federal Trade Commission and the Antitrust Division by letter that such filing has been made with the SEC and the withdrawal shall be deemed effective on the date of the SEC filing. Withdrawal of the HSR notification(s) shall occur even if statements are made in the SEC filing indicating a desire to recommence the tender offer or enter into a new or amended agreement or letter of intent. This paragraph is inapplicable if the initial 15-day or 30-day waiting period has expired without issuance of a request for additional information or documentary material and without an agreement in place with the Agencies to delay closing of

the transaction (“a timing agreement”); or early termination of that waiting period has been granted, without a timing agreement in place; or if a request for additional information or documentary material has been issued and the Agencies have either granted early termination or allowed the extended waiting period to expire following certification of compliance without a timing agreement in place.

(c) *Resubmission without a new filing fee.* (1) An acquiring person whose notification has been voluntarily withdrawn pursuant to paragraph (a) of this section, or an acquiring person whose notification is deemed to have been automatically withdrawn under paragraph (b) of this section, may resubmit its notification, thereby initiating a new waiting period for the same transaction without an additional filing fee pursuant to §803.9(f). This procedure may be used only one time, and only under the following circumstances:

- (i) The proposed acquisition does not change in any material way;
- (ii) The resubmitted notification is recertified, and the submission, as it relates to Items 4(a), 4(b), 4(c), and 4(d), is updated to the date of the resubmission;
- (iii) A new executed affidavit is provided with the resubmitted HSR filing; and
- (iv) The resubmitted notification is refiled prior to the close of the second business day after withdrawal.

(2) If the acquired person, in the case of an acquisition to which §801.30 does not apply, withdraws its notification under paragraph (a) of this section or is automatically withdrawn under paragraph (b) of this section, no resubmission is available under this paragraph.

Examples: 1. A commences a tender offer to acquire 100% of B’s voting securities and files a Schedule TO with the SEC and a premerger notification filing with the Federal Trade

Commission and the Antitrust Division (“the Agencies”). Subsequently, A decides to withdraw the tender offer and files an amended Schedule TO announcing the withdrawal. A states in its amended filing, designated as a Schedule TO-T/A on EDGAR, the SEC’s Electronic Data Gathering, Analysis, and Retrieval system, which announces the tender offer withdrawal that it reserves the right to recommence the tender offer, should circumstances change. A’s premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC.

2. A commences a tender offer for at least 75% of B’s voting securities and files a Schedule TO with the SEC stating that the tender offer will expire after 30 days. A also files a premerger notification filing with the Agencies and a request for additional information or documentary material (“Second Request”) is issued. At the end of the 30 day effective period of the tender offer sufficient shares have not been tendered and the tender offer expires. A files a closing Schedule TO-T/A with the SEC announcing the expiration of the tender offer. A’s premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC.

3. A commences a tender offer for 100% of B’s voting securities and files a Schedule TO with the SEC stating that shareholders tendering their shares will receive \$2.00 per share. During the effective period of the tender offer, A increases the amount it will pay per share to \$2.25 and files a Schedule TO-T/A with the SEC announcing the increased share price. A’s premerger notification filing is not deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC because it is not notifying the SEC that the tender offer has expired or is being withdrawn.

4. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC. During the effective period of the tender offer, A and B enter into a merger agreement and A files a Schedule TO-T/A with the SEC announcing the withdrawal of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC. A can, however, refile within two business days on the merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of §803.12(c).

5. A and B enter into a merger agreement conditioned on successful completion of due diligence. A and B file premerger notification filings with the Agencies and also Form 8-Ks with the SEC announcing they have entered into an agreement to merge. Subsequent findings in the course of due diligence cause A and B to terminate the merger agreement and A files an additional Form 8-K announcing the termination of an agreement. A states that it may seek to enter into a new or amended merger agreement with B. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Form 8-K announcing the termination of the merger agreement. A can, however, refile within two business days on a new merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of §803.12(c).

6. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8-Ks with the SEC. Second requests are issued. A and B subsequently certify compliance with the second request, starting the extended waiting period. Prior to the expiration of the extended waiting period, the parties enter into an agreement with the agency conducting the investigation to delay closing of the transaction, allowing the consummation of

the acquisition only after 30-days' notice (a "timing agreement"), and the extended waiting period expires. During the pendency of the timing agreement, A and B terminate the merger agreement and A files a Form 8-K with the SEC announcing the termination of an agreement. A's premerger notification filing is deemed withdrawn on the date of the SEC filing as a result of that filing, even though the extended waiting period has expired and the parties are still within the one year period following that expiration under §803.7(a). Note that had the extended waiting period expired and no timing agreement had been entered into, a filing with the SEC announcing the termination of the agreement would not result in the withdrawal of A's premerger notification filing.

7. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8-Ks with the SEC. The agencies complete their review and early termination of the initial 30-day waiting period is granted. Prior to the expiration of the one year period following the grant of early termination, A and B terminate the merger agreement and A files a Form 8-K with the SEC announcing the termination of an agreement. A's premerger notification filing is not deemed withdrawn as a result of the SEC filing because the initial 30-day premerger notification waiting period had been granted early termination. Therefore, the parties still have the full one year period prior to the expiration of the notification under §803.7(a) to consummate the transaction should it be recommenced.

By direction of the Commission.

Donald S. Clark
Secretary

Note: The following appendix will not appear in the Code of Federal Regulations.

**Concurring Statement of Commissioner Joshua D. Wright Regarding
Proposed Amendments to Hart-Scott-Rodino Rules**

FTC Matter No. P859910

February 1, 2013

The Commission has voted today to publish a notice of proposed rulemaking seeking comment on amendments to the Hart-Scott-Rodino (HSR) rules. Under the proposed amendments, HSR filings would be automatically withdrawn upon the submission of an SEC filing that the notified transaction had been terminated.¹ I wish to thank staff in the Premerger Notification Office for their efforts in crafting this proposed rule and their diligent administration of the premerger notification program.

I concur in the Commission's decision because I believe the Commission would benefit from the public's input into this proposed rulemaking. Nevertheless, I am concerned that the proposed rules may impose costs in excess of any potential benefits.

The proposed rulemaking appears to be a solution in search of a problem. The Federal Register notice states that the proposed rules are necessary to prevent the FTC and DOJ from "expend[ing] scarce resources on hypothetical transactions." Yet, I have not to date been presented with evidence that any of the over 68,000 transactions notified under the HSR rules have required Commission resources to be allocated to a truly hypothetical transaction. Indeed,

¹ The proposed rulemaking would also codify, with one modification, the existing procedure for pulling and refiling an HSR notification without payment of an additional filing fee. I have no objections to this proposal.

it would be surprising to see firms incurring the costs and devoting the time and effort associated with antitrust review in the absence of a good faith intent to proceed with their transaction.

The proposed rules, if adopted, could increase the costs of corporate takeovers and thus distort the market for corporate control. Some companies that had complied with or were attempting to comply with a Second Request, for example, could be forced to restart their antitrust review, leading to significant delays and added expenses. The proposed rules could also create incentives for firms to structure their transactions less efficiently and discourage the use of tender offers. Finally, the proposed new rules will disproportionately burden U.S. public companies; the Federal Register notice acknowledges that the new rules will not apply to tender offers for many non-public and foreign companies.

Given these concerns, I hope that interested parties will avail themselves of the opportunity to submit public comments so that the Commission can make an informed decision at the conclusion of this process.

[FR Doc. 2013-02821 Filed 02/13/2013 at 8:45 am; Publication Date: 02/14/2013]